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No. 84-548

In the Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL TRANSIENT DIVISION,
INTERNATIONAL BROTHERHOOD OF BOILERMAKERS,
ETC., AFL-CIO, ET AL., PETITIONERS
v.
RAYMOND J. DONOVAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 402(b) of the Labor-Management Reporting and Disclosure Act of 1959 authorizes the Secretary of Labor to bring suit to compel a labor organization that has failed to hold required periodic elections to conduct an election under the supervision of the Secretary.

2. Whether the National Transient Division is a "local labor organization" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 and therefore required to comply with the mandatory election provisions of the Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 736 F.2d 618. The opinion of the district court (Pet. App. A12-A18) is reported at 542 F. Supp. 957. The pretrial opinion of the district court (Pet. App. A19-A23) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1984. A petition for rehearing was denied on July 13, 1984 (Pet. App. A26-A27). The petition for a writ of certiorari was filed on October 3, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner National Transient Division, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO (NTD), is one of five divisions of the International, a labor organization maintaining its principal office in Kansas City, Kansas (Pet. App. A2, A13). NTD operates in 41 states and consists of approximately 8,000 members who travel throughout these states erecting steel tanks and related structures (*id.* at A2). NTD was established pursuant to the International constitution "for the purpose of giving status to and servicing those members who by the transient nature of their employment * * * have no fixed permanent place of employment and who thus are unable to carry membership in a Local Lodge or participate in its activities" (*ibid.*).

Unlike the other four divisions of the International, NTD has no separate local organizations (Pet. App. A2). Rather, it is administered solely by a national director and eight district representatives, all of whom are appointed by and responsible to the International president (*ibid.*). These officials service NTD members in the various districts across the country (*id.* at A7-A8, A10, A13). Together with other NTD members, these officials negotiate a collective bargaining agreement known as the NTD Articles of Agreement, which covers such matters as labor disputes, grievances, hours, and other basic terms and conditions of employment (*id.* at A7-A8, A13).[1] Moreover, NTD representatives administer and enforce the Articles of Agreement (*id.* at A8, A10). They handle grievances, hold meetings in which members participate, maintain out-of-work referral lists, resolve health and welfare problems, and distribute publications (*id.* at A8, A10; Tr. 152-153). NTD also

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[1]The NTD Articles of Agreement do not include wage provisions (Pet. App. A13).

collects monthly dues from its members, which are "increased in the same amount and as of the same date as any increase in the Local Lodge monthly dues" (Pet. App. A8, A10; Def. Exh. B at 82). Finally, as a "subordinate bod[y]," NTD is required to pay a monthly "per capita" tax to the International (Pet. App. A10; Def. Exh. B at 49).

Despite the foregoing, NTD has never held an election of its officers, adopted and filed a constitution and bylaws, or filed any financial reports with the Secretary of Labor (Pet. App. A2). See 29 U.S.C. 431(a) and (b), 481.

2. On May 31, 1978, several NTD members in good standing protested to the International president about the failure of NTD to conduct an election of officers (Pet. App. A14). After failing to receive a final decision from the International within three calendar months, they filed a timely complaint with the Secretary of Labor (*ibid.*). The Secretary brought this action in the United States District Court for the District of Kansas, pursuant to the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 440 and 482(b), to require NTD to hold a supervised election of officers and to maintain and file required documents. The Secretary alleged that NTD is a "local labor organization" and thus required to elect officers once every three years by secret ballot. See 29 U.S.C. 481(b). NTD took the position that it is not a "labor organization" subject to the provisions of the Act and, in any event, that it is not a "local" labor organization.

After a trial on the merits,[2] the district court held that NTD is a "national," but not a "local," labor organization subject to the LMRDA. The court acknowledged the "similarities in function" between NTD and generally recognized locals but, based on the nationwide jurisdiction of

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[2]The district court denied the Secretary's motion for summary judgment and petitioners' motion to dismiss (Pet. App. A19-A23).

the union, it concluded that NTD is a "national." The court ordered NTD to elect its officers at least once every five years, either by direct secret ballot or at a convention of delegates chosen by secret ballot (Pet. App. A14-A17). See 29 U.S.C. 481(a).[3] Both NTD and the Secretary appealed.

3. The court of appeals affirmed the district court's ruling that NTD is a "labor organization," but reversed the holding that it is a "national" rather than a "local" union (Pet. App. A1-A11). The court first held that 29 U.S.C. 482(b) authorizes the Secretary to bring suit against a labor organization that fails to hold required periodic elections. The court of appeals, like the district court (Pet. App. A14, A19-A23), rejected NTD's argument that 29 U.S.C. 482(b) authorizes the Secretary to bring suit only to set aside an invalid election, but not to compel an election that has not been conducted. Pet. App. A3-A6. The court of appeals next determined that NTD is a "labor organization" because it "is an organization in which employees participate and which represents its members concerning grievances, labor disputes, and other terms and conditions of employment" (*id.* at A6-A8).

The court of appeals further held, however, that NTD is "structurally and functionally" a "local" labor organization (Pet. App. A8-A10). It noted that NTD has the relatively simple organizational structure characteristic of locals and pays a "per capita" tax to the International, like other locals (*id.* at A10). The court found most important the fact that "NTD performs the functions of a local," including negotiating and enforcing a collective bargaining agreement (*ibid.*). Finally, the court rejected NTD's claim that, as a practical matter, it could not hold an election, noting that

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[3]A local, by contrast, must elect officers at least once every three years by direct secret ballot. 29 U.S.C. 481(b).

compliance with the LMRDA's election provisions is mandatory (*id.* at A10-A11). Accepting the district court's findings on this question (*id.* at A17-A18), the court of appeals concluded that NTD had not shown that it is unable to comply with the election requirements (*id.* at A11).

ARGUMENT

Petitioners themselves characterize (Pet. 23) this case as one of "first impression" under the LMRDA, and clearly there is no conflict between the decision below and any decision of this Court or of another court of appeals. The decision of the court of appeals correctly resolves issues of statutory interpretation, and therefore there is no reason for review by this Court.

1. Petitioners contend (Pet. 11-15) that the Secretary lacks authority to bring a Title IV suit, pursuant to 29 U.S.C. 482(b), where a union has failed to hold periodic elections as required by the Act. This argument is wholly without merit.

The plain language of Title IV unambiguously authorizes the Secretary to file suit in a situation, such as this, where an election has never been held or scheduled. This language is dispositive. See *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982); *United States* v. *Turkette*, 452 U.S. 576, 580 (1981). Section 481(b) requires that "[e]very local labor organization shall elect its officers not less often than once every three years by secret ballot among the members in good standing." Section 482(a) provides that "[a] member of a labor organization * * * may file a complaint with the Secretary * * * alleging the violation of *any* provision of section 481" (emphasis added). While petitioners have contended (see Pet. App. A4) that the statute is addressed to the Secretary's power to correct an invalid election, it manifestly does not concern itself exclusively with that situation. Section 482(b) provides that the Secretary, after

investigation, may bring a civil action "to set aside the invalid election, *if any*" (emphasis added). Finally, 29 U.S.C. 482(c) specifically states that if the court finds that "an election has not been held within the time prescribed by section 481 * * * the court shall declare the election, *if any*, to be void" (emphasis added).

In addition, the court of appeals correctly observed that construing the statute to authorize this suit "comports with the basic objective of the statute[] to guarantee democratic union elections" (Pet. App. A5). In light of this statutory background, several courts have entertained suits brought under Title IV to remedy the failure of a union to hold periodic elections. See *Marshall* v. *Local 1374, Int'l Ass'n of Machinists,* 558 F.2d 1354, 1358 (9th Cir. 1977); *Tam* v. *Rutledge,* 475 F. Supp. 559, 572 (D. Hawaii 1979); *Hodgson* v. *Union de Empleados de los Supermercados Pueblo,* 388 F. Supp. 1026, 1028-1029 (D.P.R. 1974).[4]

Petitioners' suggestion (Pet. 12-15) that an LMRDA Title I suit would be the appropriate vehicle for vindicating the electoral rights involved here is not persuasive. Their statement that Title IV is not available because "Title IV does not require elections" (Pet. 14-15) is clearly contrary to the statute. See 29 U.S.C. 481; *Local No. 82, Furniture Moving Drivers* v. *Crowley,* No. 82-432 (June 12, 1984), slip op. 11-12. Indeed, the Court recently held that,

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[4]Petitioners' attempt to distinguish *Local Union 1374* and *Supermercados Pueblo* on the ground that, in those cases, "the right to have an election had already been established" (Pet. 13-14), is unavailing. In those cases, like the instant case, the Secretary successfully secured the Title IV remedy of a supervised election in instances in which a local union had failed to hold an election every three years. That the unions in those cases apparently did not ultimately contest that they were "labor organizations" is irrelevant to the jurisdictional question whether the Secretary has the power to institute a suit when an election has not been held, for whatever reason, within the statutory time period.

if the remedy sought for an LMRDA election violation is a supervised election, "union members must utilize the remedies provided by Title IV." *Local No. 82*, slip op. 23. That is the remedy sought here. Moreover, it is questionable whether a suit challenging the failure to hold an election even raises a Title I cause of action since the focus of the Title I election provision is to prohibit discrimination among members. See *Calhoon* v. *Harvey*, 379 U.S. 134, 138-141 (1964). Thus, a Title IV suit is the appropriate means to obtain the statutory remedy sought in this case.

2. Petitioners also challenge (Pet. 15-19) the lower courts' rulings that NTD is a "labor organization" within the meaning of the LMRDA. This contention is insubstantial. Indeed, the district court noted that petitioners offered "little resistance" to this categorization (Pet. App. A16).

A "labor organization" is defined as "any organization of any kind * * * in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment." 29 U.S.C. 402(i). To assure that the LMRDA's objectives are not circumvented, it is established that the definition of "labor organization" should be read broadly. See 29 C.F.R. 451.2; S. Rep. 187, 86th Cong., 1st Sess. 52-53 (1959); H.R. Rep. 741, 86th Cong., 1st Sess. 28 (1959); *NEA* v. *Marshall*, 100 L.R.R.M. (BNA) 2565 (D.D.C. 1979).

Petitioners argue (Pet. 16-18) that NTD is not a "labor organization" because its members do not "participate" in the entity. To the contrary, the uncontroverted evidence supports the court of appeals' determination that NTD members participate in their union in every manner short of electing its officers. Specifically, NTD National Director David Lewis testified that NTD meetings in which members

participate are held in the various districts (Pet. App. A8, A10; Tr. 63-64). NTD members take part in negotiations over the NTD Articles of Agreement (Pet. App. A7; Tr. 64-65), and pay dues to NTD (Pet. App. A10). Clearly, NTD correctly was held to be a labor organization.[5]

3. The LMRDA classifies all labor organizations as either "national," "local," or "intermediate." 29 U.S.C. 481(a), (b), and (d). Petitioners contend (Pet. 19-26) that the court of appeals erred in classifying NTD as a "local." [6] While the terms "local" and "national" are not defined in the LMRDA, the Secretary's interpretative regulations, which are entitled to deference (*NLRB* v. *Bell Aerospace Co.* 416 U.S. 267, 273-274 (1974)), provide that the status of a labor organization should be determined primarily on the basis of its

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[5]Petitioners also contend (Pet. 19, 24) that NTD is merely an administrative arm or division of the International. It is well settled under the LMRDA, however, that the fact that an organization is viewed as an administrative arm or division of an International does not mean that it is not a "labor organization," as long as it deals with employers. See, *e.g., Usery* v. *Int'l Org. of Masters*, 550 F.2d 826 (2d Cir. 1977); *Brennan* v. *U.M.W.A.*, 475 F.2d 1293, 1296 (D.C. Cir. 1973). Petitioners rely (Pet. 24) solely on *Illinois Malleable Iron Co.*, 127 N.L.R.B. 1509 (1960), enforcement denied on other grounds *sub nom. NLRB* v. *Appleton Electric Co.*, 296 F.2d 202 (7th Cir. 1961), a decision under the National Labor Relations Act that predates the above-cited LMRDA decisions. However, in that case the NLRB specifically found that the entity involved did not engage in any collective bargaining activities. 127 N.L.R.B. at 1510.

Petitioners' reliance (Pet. 22) on the fact that the government has never characterized the other divisions of the International as "labor organizations" is irrelevant. Even assuming arguendo that consistency required that those divisions be classified the same as NTD, were the issue to arise, the Secretary has never received an election complaint concerning the other divisions (Tr. 49-50), and therefore it has never had the authority to investigate and determine their status. See 29 U.S.C. 482.

[6]Petitioners do not suggest how NTD should be classified if it is found to be a labor organization. Indeed, they assert (Pet. 19) that NTD cannot be placed in any of the three categories.

purposes and the functions it performs on behalf of its members. 29 C.F.R. 452.11. Applying this analysis, the court of appeals correctly concluded that "NTD is functionally and structurally a local labor organization" (Pet. App. A10).

Structurally, NTD clearly is a local. It is subordinate to the International and, at the same time, has no union entities below it. Indeed, the International constitution establishes NTD as a subordinate unit — a subdivision of the International — that sends delegates to the International convention, has officials appointed by and responsible to the International president, and pays a "per capita" tax to the International.[7] Finally, NTD lacks the complex structure of an international or national body, which typically include separate autonomous units. NTD is run by a national director who has district officials representing him in various regions. These representatives have no authority to act except with the approval of the national director. This non-complex structure is typical of a local labor organization. See *Shultz* v. *Employees' Federation,* 74 L.R.R.M. (BNA) 2140, 2143 (S.D. Tex. 1970).

Functionally, NTD also operates as a local. As the court of appeals found (Pet. App. A10), NTD performs the duties generally associated with locals. It negotiates terms of employment with contractors, handles grievances, maintains referral lists, and collects dues. In providing these and other direct services to the membership and in being the unit most immediately involved with the members' welfare, NTD unquestionably more closely resembles a local than a national. See *Shultz* v. *Employees' Federation,* 74

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[7]Such a tax has been described in another context as "one which is levied by a parent labor organization upon a *local* union with which it is affiliated." *King* v. *Randazzo,* 234 F. Supp. 388, 394 (E.D. N.Y. 1964), aff'd, 346 F.2d 307 (2d Cir. 1965) (emphasis in original).

L.R.R.M. at 2143; see generally 1 T. Kheel, *Labor Law* §§ 3.02[2], 3.03[1] (1984). To classify NTD as anything other than a local labor organization, though it is structured and functions like a local, would undercut the purposes of the statute. If NTD is not a local, its members would be the only members of the Boilermakers who could not vote, every three years, for the union officials who determine most directly their conditions of employment.

In enacting the LMRDA, Congress was addressing "a need to protect the rights of rank-and-file members to participate fully in the operation of their union through processes of democratic self-government, and, through the election process, to keep the union leadership responsive to the membership." *Wirtz* v. *Hotel Employees Union, Local 6*, 391 U.S. 492, 497 (1968). As a result, Congress prescribed minimum standards for union elections, including provisions governing how often and in what manner elections must be conducted. By setting more stringent standards for the election of local union officers (triennial secret ballot elections) than for national officers, Congress decreed that members be given a more frequent opportunity to have the union officials closest to them held accountable through the elective process. See *Labor Management Reform Legislation: Hearings on H.R. 3540, et al., Before the Joint Subcomm. of the House Comm. on Education and Labor*, 86th Cong., 1st Sess. 644 (1959) (statement of Rep. Griffin). A failure to treat NTD as a local would undermine that policy.

Contrary to petitioners' contention (Pet. 19-20), neither the migratory nature of the work nor the lack of monthly meetings militates against a finding that NTD is a local union. Transitory work patterns among local members are far from unprecedented. See, *e.g.*, *Usery* v. *Int'l Org. of Masters*, 550 F.2d 826 (2d Cir. 1977); *Shultz* v. *Radio Officers' Union*, 344 F. Supp. 58, 60, 69 (S.D. N.Y. 1972). Thus, the court of appeals recognized that "it makes little

sense to focus exclusively on the geographical proximity of the organization's membership in determining whether a labor organization is a local" (Pet. App. A9-A10).[8] By the same token, NTD's lack of monthly meetings cannot override the more significant functional and structural characteristics of the union.[9] In fact, NTD does hold periodic meetings of its members, even if not as frequently as do other Boilermaker locals (*id.* at A8, A10). Accordingly, the court of appeals correctly held that NTD was required by statute to hold triennial elections. In doing so, the court did not seek to rewrite the International's constitution, as petitioners suggest (Pet. 25), but simply ordered that an election be conducted in conformity with the constitution, "so far as lawful and practicable" (H.R. Rep. 741, *supra*, at 17). See 29 U.S.C. 482(c).

4. Petitioners renew their argument (Pet. 26-28) that the Secretary is not entitled to the relief of a supervised election because there is no proof that NTD can conduct an election of officers. This contention was correctly rejected by both courts below (Pet. App. A10-A11, A17-A18).

The election requirements and remedies of the LMRDA contain no exception for instances in which compliance may be difficult. See 29 U.S.C. 481(b), 482(c); S. Rep. 187, *supra*, at 21; H.R. Rep. 741, *supra*, at 17. In any event, the court of appeals found that petitioners "have not shown that NTD is unable to comply with the Act's election provisions" (Pet. App. A11). The court noted that NTD continues to collect dues from its members and has conducted

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[8]While petitioners correctly note (Pet. 24-25) that the court in *Shultz v. Employees' Federation*, *supra*, referred to the fact that the union there operated within a limited geographic area, the court relied primarily on the union's structural and organizational characteristics discussed above. See [redacted] L.R.R.M. at 2143-2144.

[9]Monthly meetings, of course, are not required by the LMRDA.

elections for delegates to the International convention (*ibid.*). Against this background and in light of the absence of any attempt to conduct a local election, the argument that it is impossible for NTD to elect its officers is unsupported speculation.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10]Petitioners incorrectly characterize the evidence as showing that NTD cannot deliver ballots to even "one-half" of its members (Pet. 27-28). To the contrary, the evidence demonstrates that in the 1981 election of International convention delegates, approximately 10 % of the nomination ballots were returned by the post office to the union as undelivered (Tr. 173-174), and approximately 6 % of the election ballots were returned as undelivered (Tr. 175-176).